UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRINKER INTERNATIONAL PAYROLL COMPANY LP, a limited liability partnership, Respondent, and THE SAWAYA & MILLER LAW FIRM Charging Party.	Case 27-CA-110765

RESPONDENT BRINKER INTERNATIONAL PAYROLL COMPANY LP'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Respondent Brinker International Payroll Company LP excepts to the following parts of the record in the above-captioned case: the Decision of the Administrative Law Judge ("ALJ"), dated June 24, 2014, as identified below.

Exceptions to the Decision of the ALJ

Respondent respectfully excepts to:

1. The ALJ's finding/conclusion that Respondent's "maintenance and enforcement" of the Agreement to Arbitrate violates Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") by requiring employees to waive their right to pursue claims collectively in any forum. [ALJ Decision, "ALJ Dec.," 4:13-15; 4:21-24]

2. The ALJ's finding/conclusion that the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011) does not render the NLRB's decision in *D.R.*

Horton, Inc., 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) unenforceable under the circumstances of this case. [ALJ Dec., 4:33-45]

3. The ALJ's finding/conclusion that the Supreme Court's decisions in *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) and *American Express v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) do not overrule the Board's *D.R. Horton* decision. [ALJ Dec., 4:38-43]

4. The ALJ's failure to find/conclude that Respondent's Agreement to Arbitrate lawfully prohibits class or collective legal actions because there is no contrary congressional command in the NLRA that would render such a class action waiver inapplicable. [ALJ Dec., 4:38-43]

5. The ALJ's conclusion that the lawfulness of Respondent's Agreement to Arbitrate must be judged by the Board's decision in *D.R. Horton*, which has been rejected by the Second, Fifth, Eighth, Ninth and Eleventh Circuits and by the vast majority of state and federal courts that have considered it. [ALJ Dec., 5:3-16]

6. The ALJ's failure to find/conclude that Respondent's Agreement to Arbitrate is a contract that must be enforced according to its terms in compliance with the Federal Arbitration Act ("FAA") 9 U.S.C. § 1, *et seq.*

7. The ALJ's failure to conclude that the FAA, as interpreted by the U.S. Supreme Court, prevails over the Board's decision in *D.R. Horton.*

8. The ALJ's failure to find/conclude that, under the FAA, Respondent's Agreement to Arbitrate is valid and lawful, and must be enforced according to its terms.

9. The ALJ's failure to find/conclude that the class action waiver in Respondent's Agreement to Arbitrate is valid and enforceable pursuant to the FAA, as interpreted by recent decisions of the U.S. Supreme Court.

10. The ALJ's failure to conclude that the NLRA does not contain an express congressional command that exempts the Board from following the U.S. Supreme Court's interpretation of the FAA.

11. The ALJ's refusal to follow the reasoning of Administrative Law Judge Bruce Rosenstein in *Chesapeake Energy Corporation*, No. 14-CA-100530, 2013 NLRB LEXIS 693 (November 8, 2013). [ALJ Dec., 4:46-50]

12. The ALJ's failure to find/conclude that the Board's *D.R. Horton* decision is invalid because the Board lacked a valid quorum at the time the decision was issued. [ALJ Dec., 5:18-25]

13. The ALJ's reliance on the Board's *D.R. Horton* decision, which was void *ab initio*, in concluding that Respondent's Agreement to Arbitrate violated the Act. [ALJ Dec., 4:13-15]

14. The ALJ's failure to find/conclude that any issues involving the formation of the arbitration contracts between Sarah Hickey ("Hickey"), Amy Gulden ("Gulden"), Jay Ragsdale ("Ragsdale") and Respondent are barred by Section 10(b) of the NLRA.

15. The ALJ's conclusion that Respondent's Agreement to Arbitrate should be treated "as work rules subject to this particular 10(b) analysis." [ALJ Dec., 5:31-34]

16. The ALJ's failure to find/conclude that Respondent's Agreement to Arbitrate was a *contract* between Hickey, Gulden, Ragsdale and Respondent, and not a work rule.

17. The ALJ's failure to find/conclude that Charging Party's 8(a)(1) allegations are barred by Section 10(b) of the Act. [ALJ Dec., 5:37-38]

18. The ALJ's conclusion that Respondent's Agreement to Arbitrate violates Section 8(a)(1) of the Act by prohibiting employees from "initiating or pursuing any class or collective claim in any forum." [ALJ Dec., 5:40-42]

19. The ALJ's conclusion that Respondent's Agreement to Arbitrate is subject to the Board's test for "rules" set forth in such cases as *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). [ALJ Dec., 6:1-11]

20. The ALJ's conclusion that "employees would reasonably interpret Respondent's Agreement to Arbitrate as prohibiting them from filing unfair labor practice charges" in violation of Section 8(a)(1) of the Act. [ALJ Dec., 6:13-15]

21. The ALJ's conclusion that "Respondent's maintenance of the Agreement as a condition of employment" violates Section 8(a)(1) of the Act. [ALJ Dec., 6:14-16]

22. The ALJ's conclusion that the language in Respondent's Agreement to Arbitrate stating that it "does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC)" is insufficient to alert employees that the Agreement to Arbitrate does not prohibit the filing of unfair labor practice charges with the Board. [ALJ Dec., 6:43-46]

23. The ALJ's failure to conclude that the FAA precludes and preempts the Board from dictating the nature and extent of language that must be included in an arbitration agreement regarding the right of employees to file charges with government agencies such as the Board.

24. The ALJ's finding/conclusion that a reasonable employee would not understand that Respondent's Agreement to Arbitrate does not limit or prohibit the filing of unfair labor practice charges with Board. [ALJ Dec., 7:13-20]

25. The ALJ's finding/conclusion, based solely on speculation and not on evidence, that "employees would reasonably interpret the Agreement to Arbitrate as prohibiting the filing of unfair labor practice charges, and that Respondent's maintenance of the Agreement to Arbitrate as a condition of employment violated Section 8(a)(1) as a result." [ALJ Dec., 7:22-23]

26. The ALJ's finding/conclusion that Respondent's Agreement to Arbitrate violated the Act because it could reasonably be interpreted as preventing employees from filing charges with the Board, even though the Complaint includes no such allegations.

27. The ALJ's failure to find/conclude that Charging Party's unfair labor practice charge cannot support a Complaint by the General Counsel which alleges that Respondent's Agreement to Arbitrate was unlawful or invalid since such allegations are barred by Section 10(b) of the Act.

28. The ALJ's failure to find/conclude that Respondent's Agreement to Arbitrate advised employees of their right to file charges with the Board and have access to the Board and its processes.

29. The ALJ's failure to find/conclude the Respondent's Agreement to Arbitrate does not restrict or impede employees' from filing charges with the Board and having access to the Board and its processes.

30. The ALJ's failure to find/conclude that Respondent did not take any action that in any way interfered with Hickey's, Gulden's and Ragsdale's right to file unfair labor practice charges or have access to the Board and its processes.

31. The ALJ's failure to find/conclude that because Hickey, Gulden and Ragsdale, in fact, filed an unfair labor practice charge with the Board, they did not interpret the Agreement to

Arbitrate as a prohibition on their right to file unfair labor practice charges or have access to the Board and its processes.

32. The ALJ's failure to find/conclude that Respondent did not interpret or administer its Agreement to Arbitrate in a manner that impeded or prevented Hickey, Gulden or Ragsdale, or any other employee, from filing unfair labor practice charges or having access to the Board and its processes.

33. The ALJ's failure to find/conclude that Respondent did not invoke or maintain against Hickey, Gulden or Ragsdale any alleged policy, practice or agreement which interfered with their right to file unfair labor practice charges or have access to the Board and its processes.

34. The ALJ's failure to find/conclude that the General Counsel's Complaint, to the extent it alleges Respondent violated Sections 7 and 8(a)(1) of the Act because employees would reasonably conclude they were precluded from filing unfair labor practice charges with the Board, is an impermissible attempt to obtain declaratory relief because Charging Party's unfair labor practice charge does not allege that Hickey, Gulden or Ragsdale were impeded or restrained from filing unfair labor practice charges with the Board.

35. The ALJ's failure to find/conclude that the General Counsel's Complaint, to the extent it alleges Respondent violated Sections 7 and 8(a)(1) of the Act because employees would reasonably conclude they were precluded from filing unfair labor practice charges with the Board, is barred by the six-month limitations period in Section 10(b) of the Act.

36. The ALJ's finding/conclusion that Respondent violated Section 8(a)(1) of the Act by enforcing the Agreement to Arbitrate when it filed the Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims ("Motion to Compel"). [ALJ Dec., 7:30-32]

37. The ALJ's finding/conclusion that "Respondent's Motion to Compel had an illegal objective within the meaning of *Bill Johnson's Restaurants* and its progeny, in that it constituted both an attempt to enforce a policy which was in and of itself unlawful and an effort to directly proscribe employees' protected activity." [ALJ Dec., 7:32-35]

38. The ALJ's finding/conclusion that Respondent violated Section 8(a)(1) by filing the Motion to Compel. [ALJ Dec., 7:36-37; 8:43-44; 9:20-22]

39. The ALJ's finding/conclusion that "Respondent's Motion to Compel in the instant case had an illegal objective in that it was an attempt to enforce the unlawful Agreement to Arbitrate." [ALJ Dec., 8:29-30; 9:16-18]

40. The ALJ's finding/conclusion that the Motion to Compel violated Section 8(a)(1) as an attempt to directly prevent employees from engaging in activity protected by Section 7." [ALJ Dec., 8:46-47]

41. The ALJ's finding/conclusion that the Motion to Compel interfered with activities protected by Section 7 of the Act by seeking dismissal of the employees' class action claims. [ALJ Dec., 9:8-9]

42. The ALJ's failure to find/conclude that Respondent asserted the Agreement to Arbitrate as an affirmative defense and filed the Motion to Compel only because Hickey, Gulden and Ragsdale breached their contract to arbitrate their employment claims by filing a putative wage and hour class action against Respondent.

43. The ALJ's finding/conclusion that Hickey, Gulden and Ragsdale were engaged in protected concerted activity when they filed and pursued their class action suit. [ALJ Dec., 9:14-16]

44. The ALJ's failure to conclude that a class action is a procedural device used in civil litigation, not a substantive legal right.

45. The ALJ's conclusion that the mere filing of a class or collective action constitutes protected concerted activity. [ALJ Dec., 9:10-16]

46. The ALJ's conclusion that the Board has the authority to order reimbursement of litigation expenses for actions taken in court. [ALJ Dec., 10:45-49]

47. The ALJ's failure to conclude that the Board has no jurisdiction to interfere with litigation pending in state and federal courts by awarding reimbursement of costs and attorney's fees to charging parties who file unfair labor practice with the Board.

48. The ALJ's failure to properly apply the statute of limitations in Section 10(b) of the Act by concluding that when "a rule violating Section 8(a)(1) is maintained during the 10(b) period, a violation is established even if the rule was promulgated prior to that time." [ALJ Dec., 5:28-30]

49. The ALJ's failure to conclude that the General Counsel's Complaint does not allege facts which, if true, would establish that Respondent interfered with, restrained or coerced Hickey, Gulden and Ragsdale in the exercise of their rights guaranteed by Section 7 of the Act.

50. The ALJ's failure to find that Hickey, Gulden and Ragsdale filed their unfair labor practice charge in this proceeding approximately 14 months after they became bound by the most recent version of the Agreement to Arbitrate in June 2012.

51. The ALJ's failure to find/conclude that both Charging Party and the General Counsel are barred by Section 10(b) of the Act from contending that Hickey, Gulden and Ragsdale did not voluntarily enter into valid and binding arbitration agreements with Respondent, when Hickey, Gulden and Ragsdale voluntarily elected to remained employed with

Respondent, knowing full well that a term of their employment would be to arbitrate any employment-related disputes on an individual and not on a class-wide basis.

52. The ALJ's failure to find/conclude that neither Charging Party nor the General Counsel can attack contract formation issues, including the voluntariness of the Agreement to Arbitrate, 14 months after the contract was formed.

53. The ALJ's failure to find/conclude that Section 10(b) of the Act forecloses the General Counsel from litigating the alleged "unlawfulness" of Respondent's Agreement to Arbitrate that Hickey, Gulden and Ragsdale signed in June 2012.

54. The ALJ's Conclusions of Law Nos. 2, 3 and 4 in their entirety. [ALJ Dec., 9:29-42]

55. The ALJ's Remedy requiring Respondent to revise or rescind its Agreement to Arbitrate, provide all employees with a revised copy of the Agreement, and post notices in all locations where the Agreement to Arbitrate was utilized. [ALJ Dec., 10:11-21]

56. The ALJ's Remedy requiring Respondent to file a joint motion with Charging Party to vacate the District Court's February 18, 2014 Order granting Respondent's Motion to Compel. [ALJ Dec., 10:25-29]

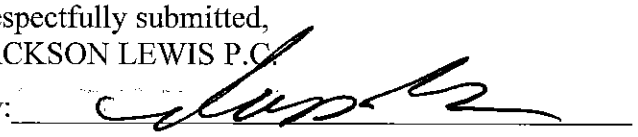
57. The ALJ's Remedy requiring Respondent to reimburse Hickey, Gulden and Ragsdale for any litigation and related expenses pertaining to Respondent Motion to Compel. [ALJ Dec., 10:45-49]

58. The ALJ's recommended Order in its entirety. [ALJ Dec., 11:10-12:25]

59. The ALJ's proposed Notice to Employees in its entirety. [ALJ Dec., Appendix]

Dated: July 11, 2014

Respectfully submitted,
JACKSON LEWIS P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify:

I am employed in the County of Douglas, State of Nebraska. I am over the age of eighteen years and not a party to the within action; my business address is Jackson Lewis P.C., 10050 Regency Circle, Suite 400, Omaha, NE 68114.

On July 11, 2014, I served the within:

RESPONDENT BRINKER INTERNATIONAL PAYROLL COMPANY, LP'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

on the parties and interested persons in said proceeding:

X by **first class mail** upon the following persons, addressed to them at the following addresses:

David Miller The Sawaya Law Firm 1600 Ogden Street Denver, CO 80218-1414	Attorneys for Charging Parties
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Wanda Pate Jones Regional Director National Labor Relations Board Region 27 Byron Rogers Federal Office Bldg. 1961 Stout Street, Suite 13-103 Denver, CO 80294	Regional Director

Additionally, on July 11, 2014, I will electronically file the above-mentioned document with the National Labor Relations Board's Office of Executive Secretary.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed on this 11th day of July, 2014, at Omaha, Nebraska.

/s/ Ross M. Gardner
Ross M. Gardner